IN THE SUPREME COURT OF TEXAS

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NO. 01-0988
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RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS, AND HENRY CUELLAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF TEXAS, APPELLANTS

v.

ALICIA DEL RIO, ET AL., APPELLEES

- consolidated with -

444444444444
NO. 01-1002
444444444444

ALICIA DEL RIO, ET AL., APPELLANTS

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS, AND HENRY CUELLAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF TEXAS, APPELLEES

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ON DIRECT APPEALS FOR THE 353RD DISTRICT COURT, TRAVIS COUNTY, TEXAS
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Argued on October 18, 2001

CHIEF JUSTICE PHILLIPS, joined by JUSTICE HANKINSON, dissenting.

Our Court's direct appeal jurisdiction is limited to appeals "from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state." TEX. GOV'T CODE § 22.001(c). Although the final judgment in the court below included a permanent injunction, it only enjoined the "use of the existing 30 congressional districts in Texas as reflected in Plan 1000C[1] in any primary or general election."[2] No party before this Court is complaining about that part of the judgment. The only dispute in the trial court or here concerns how to divide the state into the thirty-two districts that will each elect a member of the next Congress. Thus, no party in this Court is challenging or defending the constitutionality of a statute, much less challenging or defending the grant or denial of an injunction based on the constitutionality of a statute. There is therefore no appeal "from an order . . . granting or denying an . . . injunction on the ground of the constitutionality of a statute." On the plain language of section 22.001(c), I would withdraw our note of probable jurisdiction and dismiss the appeal for want of jurisdiction.

The right to direct appeal did not exist until 1940, when the people of Texas adopted section 3-b of Article V of the Texas Constitution to permit the Legislature to provide for such a remedy.[3] Specific

[1] Plan 1000C was the Legislature's redistricting plan, TEX. REV. CIV. STAT. art 197h, based on the 1990 census, as modified by the courts in *Vera v. Bush*, 933 F. Supp. 1341, 1342 (S.D. Tex. 1996).

[2] The trial court also declared the thirty congressional districts unconstitutional and enjoined their use in its finding of fact 33.

[3] The people had rejected a similar amendment in 1927 and 1929. THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 388-89 (George D. Braden, ed., 1977).

constitutional authorization was necessary because Section 3 of Article V of the Constitution then limited the Supreme Court's appellate jurisdiction to certain cases that had been decided by the courts of civil appeals.[4] Pursuant to that amendment, the Legislature provided for direct appeals beginning Jan. 1, 1944. TEX. GOV'T CODE § 22.001(c). As that statute directed, the Supreme Court promulgated Texas Rule of Civil Procedure 499a, effective Dec. 31, 1943, to "prescribe the necessary rule of procedure to be followed in perfecting the appeal." TEX. GOV'T CODE § 22.001(c). That rule, which remained essentially unchanged until the Court adopted the Texas Rules of Appellate Procedure in 1986, is somewhat more detailed than its successor rules, Texas Rule of Appellate Procedure 140 (eff. Sept. 1, 1986 to Aug. 31, 1997) and current Texas Rule of Appellate Procedure 57 (eff. Sept. 1, 1997). In part, the original rule provided:

> An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute . . . or the validity or invalidity of an administrative order . . . when the same *shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction*.

TEX. R. CIV. P. 499a(b)(eff. Dec. 31, 1943)(emphasis added). While today's rule has been shortened to address only purely procedural matters, the Court's contemporaneous explanation of the scope of the remedy is still instructive.

In *Bryson v. High Plains Underground Water Conservation Dist. No.1*, 297 S.W.2d 117 (Tex. 1956), Bryson had attempted to directly appeal a permanent injunction barring him from producing more

[4] Since 1981, the Court's appellate jurisdiction has extended to all civil cases "as . . . provided . . . by law," TEX. CONST. art. V, § 3, so that the Legislature could now provide for direct appeals without a specific constitutional grant of authority. *Cf.* Braden, *supra* note 3 at 381-83, 388-89.

than 100,000 gallons of water a day from his well without a permit from the water conservation district. During the trial, he had unsuccessfully attacked the constitutionality of portions of the statute that created the district. This Court ruled that it did not have direct appeal jurisdiction simply because a statute was challenged on constitutional grounds in the trial court if that question was not presented on direct appeal. In interpreting the jurisdictional statute, the Court said:

> For us to have jurisdiction of a direct appeal, it must appear that *a question of the constitutionality of a Texas statute* . . . was properly raised in the trial court, that *such question* was determined by the order of such court granting or denying an interlocutory or permanent injunction, and that *the question is presented to this Court for decision*.

Id. at 119 (emphasis added). None of the appeals to this Court in this case meet this standard.

Here, all parties concede that the old congressional district lines are unconstitutional. While the state's population has grown by nearly twenty-three percent in the last decade, entitling Texas to two new seats in Congress, sixty-eight of the state's 254 counties actually lost population. New districts are indisputably necessary, and the Legislature's failure to draw those districts left the decision with the courts. If the Seventy-Seventh Legislature had passed a congressional redistricting act, any subsequent legal challenges would have involved parties objecting to the act as plaintiffs and parties supporting the act as defendants. If the trial court had enjoined the Legislature's plan on the basis of unconstitutionality, the plan's defenders would have had grounds for a direct appeal. Conversely, if the trial court had accepted the Legislature's plan against a constitutional attack and denied an injunction on that basis, the plan's objectors could have brought a direct appeal. When the Legislature has acted on redistricting, this Court can hear direct appeals on issues of law if the trial judge has granted or denied injunctive relief on

constitutional grounds regarding that action. *See, e.g., Richards v. Mena*, 820 S.W.2d 371 (Tex. 1991); *Upham v. White*, 639 S.W.2d 301 (Tex. 1982); *Smith v. Craddick*, 471 S.W.2d 375 (Tex. 1971). But because the Legislature did not act after the 2000 Census, even if the trial court had issued a mandatory injunction in support of its plan, it would still not have been an "injunction on the ground of the constitutionality of a *statute*" (emphasis added).

We have always strictly construed our direct appeal jurisdiction. *See, e.g., Texas Workers' Compensation Comm'n v. Garcia*, 817 S.W.2d 60, 61 (Tex. 1991); *Mitchell v. Purolator Security, Inc.*, 515 S.W.2d 101 (Tex. 1974); *Gardner v. Railroad Comm'n*, 333 S.W.2d 585 (Tex. 1960). For example, in *Boston v. Garrison*, 256 S.W.2d 67, 70 (Tex. 1953), this Court denied jurisdiction because the trial court order, though called an injunction, was in essence a mandamus. The Court explained that although the two actions are related, they serve different functions because injunctions are preventive while mandamus actions are remedial. Today's decision wholly ignores this standard of strict construction.

Dismissing a case on jurisdictional grounds may be frustrating to judges and litigants alike, particularly when issues of statewide import are involved. The Supreme Court has determined that states should have the first opportunity to provide a constitutional redistricting plan, *see Growe v. Emison*, 507 U.S. 25, 40 (1993), and state actors are understandably anxious to comply with this mandate of federalism. However, the Legislature has chosen to make direct appeal an uncommon remedy, available only in rare and specific situations. Regardless of the day's exigencies, our highest and only duty is to respect the appropriate limits of our power.

As Justice Jackson once said for the Supreme Court: "We agree that this is a hard case, but we

cannot agree that it should be allowed to make bad law." *Fed. Communications Comm'n v. WOKO*, 329 U.S. 223, 229 (1946). I fear that our Court has allowed a hard case to make bad law today.

Thomas R. Phillips
Chief Justice

OPINION DELIVERED: October 19, 2001